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19 **UNITED STATES DISTRICT COURT**

20 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

21 BEN Z. HALBERSTAM, on Behalf of  
22 Himself and All Others Similarly  
23 Situated,

24 Plaintiff,

v.

25 NJOY, INC.; and SOTTERA, INC.,

26 Defendants.

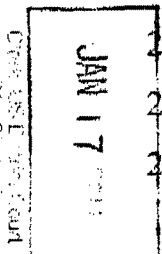
Case No.

**COMPLAINT FOR VIOLATIONS  
OF: (1.) CAL. CONSUMERS  
LEGAL REMEDIES ACT; (2.)  
CAL. UNFAIR COMPETITION  
LAW; AND (3.) BREACH OF  
EXPRESS WARRANTY**

Class Action

DEMAND FOR JURY TRIAL

CV14-428 MMM (L2x)



1 Plaintiff, Ben Z. Halberstam, by and through his undersigned attorneys,  
2 brings this action on behalf of himself and all others similarly situated, based upon  
3 personal knowledge as to himself and his activities, and on information and belief as  
4 to all other matters, against defendants, NJOY, Inc. and Sottera, Inc. (collectively,  
5 “NJOY”<sup>1</sup> or “Defendant”), and alleges as follows:

6 **JURISDICTION AND VENUE**

7 1. Diversity subject matter jurisdiction exists over this class action pursuant  
8 to the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005),  
9 amending 28 U.S.C. § 1332, at new subsection (d), conferring federal jurisdiction  
10 over class actions involving: (a) 100 or more members in the proposed class; (b)  
11 where at least some members of the proposed class have different citizenship from  
12 some defendants; and (c) where the claims of the proposed class members exceed  
13 the sum or value of five million dollars (\$5,000,000) in the aggregate.  
14 28 U.S.C. §§ 1332(d)(2) and (6).

15 2. This Court has personal jurisdiction over Defendant because Defendant  
16 has purposefully availed itself of the privilege of conducting business in the State of  
17 California.

18 3. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because many  
19 of the acts and transactions giving rise to this action occurred in this District and  
20 because Defendant:

- 21 a. has intentionally availed itself of the laws and markets within this  
22 District through the promotion, marketing, distribution and sale of its  
23 products in this District;  
24 b. does substantial business in this District; and  
25 c. is subject to personal jurisdiction in this District;

26 <sup>1</sup> Sottera, Inc. was formerly the parent company of NJOY, Inc. and was wholly  
27 merged into NJOY, Inc. in July 2012.  
28

1 and because Plaintiff:

- 2 a. was exposed to Defendant's misleading practices and representations in  
3 this District; and  
4 b. purchased NJOY E-Cigarettes in this District.

5 **NATURE OF THE ACTION**

6 4. Defendant, the manufacturer of the NJOY brand of electronic  
7 cigarettes, has a uniform and long-standing pattern of employing unfair and  
8 deceptive practices with respect to the sale of its products through  
9 misrepresentations and omissions concerning the potential health risks thereof.  
10 During the relevant period, NJOY manufactured and sold, among others, NJOY,  
11 NJOY Kings, and OneJoy e-cigarettes. These, together with related paraphernalia  
12 such as NJOY replacement batteries, chargers, and cartridges, are collectively  
13 referenced herein as "NJOY E-Cigarettes." For example, one of Defendant's  
14 principal marketing slogans is that its NJOY E-Cigarettes provide "everything you  
15 like about smoking without the things you don't," and variations of that statement.  
16 This is deceptive, false and misleading because it is not true that NJOY E-Cigarettes  
17 are "without the things you don't" like about traditional tobacco cigarettes. Studies  
18 have shown that electronic cigarettes, including NJOY E-Cigarettes contain disease-  
19 causing substances that are dangerous to your health – which are among the most  
20 important "things you don't" like about traditional tobacco cigarettes. In fact,  
21 despite Defendant's marketing slogan that its NJOY E-Cigarettes are "without the  
22 things you don't" like about traditional tobacco cigarettes, which conveys the  
23 impression that NJOY E-Cigarettes carry no risk of and do not cause disease as  
24 traditional tobacco cigarettes do, Defendant fails to disclose not only what it should  
25 know about the contents of its own products, but that numerous studies have shown  
26 that electronic cigarettes, including NJOY E-Cigarettes, contain carcinogens, toxins  
27 and other impurities (including some of those also found in tobacco cigarettes) that  
28

1 do carry the risk of and cause disease. Studies also show that certain electronic  
2 cigarettes, including NJOY E-Cigarettes, require that the user take deeper puffs to  
3 produce vapor than the puffs required for a traditional tobacco cigarette, and that  
4 this could be harmful to users' health. Furthermore, there is widespread agreement  
5 in the scientific community that further research is necessary before the full negative  
6 effects of electronic cigarette use on users' health can be known.

7 5. Defendant has employed numerous methods to convey to consumers  
8 throughout the United States its deceptive, false and misleading message about its  
9 E-Cigarettes, including its packaging, product inserts, and print advertisements, as  
10 well as its website through which it sells its product directly to the public. NJOY,  
11 <http://www.njoy.com/njoy-kings/njoy-king-3-pack.html> (last visited Jan. 7, 2014).

12 6. As a result of Defendant's deceptive, false and misleading claims in its  
13 advertising, consumers – including Plaintiff and the other members of the proposed  
14 Class – have purchased NJOY E-Cigarettes without being advised that they contain  
15 a variety of toxins, impurities, and related potential health hazards as found by  
16 various studies discussed in more detail below. Had Defendant disclosed these  
17 material facts, Plaintiff would not have purchased Defendant's NJOY E-Cigarettes.  
18 Defendant was able to charge more than what its NJOY E-Cigarettes would have  
19 been worth had it disclosed the truth about them.

20 7. Plaintiff brings this lawsuit against Defendant, on behalf of himself and  
21 the proposed Class, in order to (a) halt the dissemination of Defendant's deceptive  
22 advertising message, (b) correct the false and misleading perception Defendant has  
23 created in the minds of consumers through its representations and omissions, and (c)  
24 secure redress for consumers who have purchased one or more NJOY E-Cigarettes.  
25 Plaintiff, on behalf of himself and the proposed Class, alleges violations of the  
26 California Business & Professions Code §§ 17200, *et seq.*, and the Consumers Legal  
27  
28

1 Remedies Act, California Civil Code §§ 1750, *et seq.*, as well as breach of express  
2 warranty in violation of Cal. Com. Code § 2313 and common law.

3 **PARTIES**

4 ***Plaintiff***

5 8. Plaintiff Ben Z. Halberstam (“Halberstam” or “Plaintiff”) is an  
6 individual whose home is in Los Angeles, California and who is a citizen of  
7 California. During the relevant period, Plaintiff, while in the State of California,  
8 was exposed to and saw Defendant’s material, deceptive marketing claims and  
9 packaging. As a result of that misleading marketing and packaging and Defendant’s  
10 omissions, he believed that NJOY’s products did not carry dangers or risks like  
11 traditional cigarettes do. While in the State of California, he purchased NJOY E-  
12 Cigarettes. Had Defendant disclosed that NJOY E-Cigarettes contain a variety of  
13 toxins, impurities, and related potential health hazards which is, or should be known  
14 to Defendant, and as found by various studies discussed in more detail below,  
15 including some also found in tobacco cigarettes, Plaintiff would not have purchased  
16 Defendant’s NJOY E-Cigarettes. Thus, as a result of Defendant’s material deceptive  
17 claims and omissions, Plaintiff suffered injury in fact and lost money.

18 9. Plaintiff Halberstam first purchased NJOY E-Cigarettes in September  
19 2013, at Walgreens located at 8770 W. Pico Blvd., Los Angeles, California. He  
20 purchased NJOY Kings disposable E-Cigarettes. He thereafter intermittently  
21 purchased additional NJOY Kings. In total, Plaintiff purchased approximately five  
22 NJOY E-Cigarettes for which he paid the retail market price for each, which he  
23 believes was \$7.99. On information and belief, the price was \$7.99 for a single  
24 disposable NJOY Kings E-Cigarette at all relevant times.

25 ***Defendant***

26 10. Sottera, Inc. is a former corporation which was incorporated in the state  
27 of Nevada, and had its corporate headquarters at 15211 North Kierland Boulevard,  
28

1 Suite 200, Scottsdale, AZ 85254. Upon information and belief, it was parent to  
2 NJOY, Inc., and in July 2012, merged into NJOY, Inc.

3 11. NJOY, Inc. is incorporated in Delaware, and has its corporate  
4 headquarters at 15211 North Kierland Boulevard, Suite 200, Scottsdale, AZ 85254.  
5 NJOY also has an address at 5455 N Greenway Hayden # 15, Scottsdale, AZ 85260.  
6 Upon information and belief, NJOY merged with its parent, Defendant Sottera, in  
7 July 2012.

8 12. Plaintiff alleges, on information and belief, that at all times herein,  
9 Defendant's agents, employees, representatives, executives, directors, partners,  
10 and/or subsidiaries were acting within the course and scope of such agency,  
11 employment, and representation, on behalf of Defendant.

## 12 **FACTUAL ALLEGATIONS**

### 13 **I. ELECTRONIC CIGARETTES**

14 13. This action concerns the NJOY E-Cigarettes and related paraphernalia  
15 sold by Defendant, including but not limited to those marketed under the names  
16 NJOY, NJOY Kings, and OneJoy.

17 14. An electronic cigarette, or e-cigarette, is a device that simulates tobacco  
18 smoking. E-cigarettes are designed to deliver a smoking-like "hit" of vapor, usually  
19 containing nicotine, which is inhaled by the user. They work through the use of a  
20 battery operated heating mechanism, which typically converts a cartridge containing  
21 glycerin, glycol, natural and artificial flavors and, in most electronic cigarettes,  
22 various proportions of nicotine, into vapor. When a person inhales ("vapes") from  
23 an e-cigarette, this mimics the taking of a "drag" on a traditional tobacco cigarette.  
24 A heating device is activated, the solution is converted into vapor, and the consumer  
25 breathes it in. Many electronic cigarettes, including those manufactured by  
26 Defendant, are designed to look like tobacco cigarettes. The cylinder containing the  
27 components is the size and shape of a traditional cigarette; it is encased in a material  
28



resembling white paper printed to look like a traditional cigarette wrapper, and glows red at the tip when the user inhales.

15. According to a 2011 study by the Centers for Disease Control and Prevention (“CDC”), as of that year, more than one fifth of smokers in the United States had tried electronic cigarettes, and 6% of all adults had tried them.<sup>2</sup>

16. According to a subsequent study by the CDC, nearly 1.8 million middle and high school students tried e-cigarettes in 2011 and 2012, including approximately 160,000 students who had never used conventional cigarettes.<sup>3</sup> The study also found that the number of U.S. middle and high school student e-smokers doubled between 2011 and 2012.<sup>4</sup>

17. According to analysts, sales of e-cigarettes in America in 2012 were between \$300 million and \$500 million.<sup>5</sup> This was approximately double what they were in the preceding year, and sales have been projected to double again in 2013.<sup>6</sup>

18. Defendant sells what is reportedly “America’s top-selling brand of e-cigarettes.”<sup>7</sup> On Defendant’s website, it states that it makes “America’s #1 E-

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<sup>2</sup> Press Release, Centers for Disease Control and Prevention, *About one in five U.S. adult smokers have tried an electronic cigarette* (Feb. 28, 2013), [http://www.cdc.gov/media/releases/2013/p0228\\_electronic\\_cigarettes.html](http://www.cdc.gov/media/releases/2013/p0228_electronic_cigarettes.html) (last visited Jan. 7, 2014).

<sup>3</sup> Morbidity and Mortality Weekly Report, Centers for Disease Control and Prevention, *Notes from the Field: Electronic Cigarette Use Among Middle and High School Students — United States, 2011–2012* (Sept. 6, 2013), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6235a6.htm> (last visited Jan. 7, 2014).

<sup>4</sup> *Id.*

<sup>5</sup> *See E-cigarettes: Vape ‘Em if You Got ‘Em*, The Economist, Mar. 23, 2013.

<sup>6</sup> *Id.*

<sup>7</sup> *See* NJOY, <http://www.njoy.com/how-it-works> (last visited Jan. 7, 2014).

1 Cigarette,” and claims, “Over 3 Million Sold.”<sup>8</sup> NJOY controls about 40 percent of  
2 the U.S. electronic cigarette market, according to its CEO, Craig Weiss.<sup>9</sup>

3 19. NJOY E-Cigarettes (including related paraphernalia) sell for a range of  
4 prices. According to a press release by Defendant dated December 6, 2012,  
5 announcing the nationwide availability of NJOY Kings, the product was introduced  
6 with a retail price of \$7.99. As of the filing of this Complaint, individual NJOY  
7 Kings can be purchased at stores including various stores in California, such as  
8 Walgreens in Los Angeles. On its website, Defendant offers these products at rates  
9 including a pack of two disposable OneJoy E-Cigarettes for \$21.99, a pack of three  
10 disposable NJOY Kings for \$26.97, a five pack of disposable NJOY Kings for  
11 \$29.95, a ten pack of disposable NJOY Kings for \$59.90 and a twenty pack of  
12 disposable NJOY Kings for \$119.80. An NJOY starter kit for its rechargeable  
13 cigarette line, which includes one charger, one battery, and one refill cartridge, costs  
14 \$21.99. Accessories for rechargeable NJOYs are also offered on NJOY’s website,  
15 and include a pack of five cartridge refills for \$21.99 and a universal charger for  
16 \$15.99. On information and belief, in the early portion of the relevant period,  
17 Defendant offered a slightly different array of products – NJOY Kings, for example,  
18 were first marketed under that label in December 2012 – and certain products  
19 offered by Defendant in prior years, such as its chargers and batteries, were more  
20 expensive than those offered now.

21 20. NJOY’s products are more expensive than those of certain of its  
22 competitors. For example, White Cloud, a competitor, offers individual disposables  
23

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24  
25 <sup>8</sup> *Id.*

26 <sup>9</sup> Burritt, Chris, *E-Cigarette Maker NJOY Seen as Takeover Target Amid Innovation*,  
27 Bloomberg, Dec 5, 2012, <http://www.bloomberg.com/news/2012-12-05/e-cigarette-maker-njoy-seen-as-takeover-target-amid-innovation.html> (last visited Jan. 7, 2014).  
28



1 for \$5.99, and a five pack of rechargeables for \$9.95.<sup>10</sup> Another competitor, Metro  
 2 E-Cigs, offers individual disposables for \$5.95.<sup>11</sup> v2 Cigs, another leading  
 3 electronic cigarette manufacturer, offers on its website a three pack of disposable e-  
 4 cigarettes for \$15.95, a sampler six pack for \$29.95, a five pack for \$29.95, and a  
 5 ten pack for \$54.95, as well as a five pack of rechargeables for \$9.95.<sup>12</sup> Yet  
 6 another competitor, Mistic, sells one disposable electronic cigarette for \$5.99, a  
 7 starter kit for its rechargeable electronic cigarettes that includes two cartridges, one  
 8 battery, and one USB charger, and refills for 3 five packs for \$29.99 and 12 five  
 9 packs for \$129.99; and a five pack of cartridges for its rechargeable e-cigarettes for  
 10 \$14.99.<sup>13</sup> Krave offers individual disposable Krave King e-cigarettes for \$6.95 and  
 11 a five pack of cartridges for its rechargeable e-cigarettes for \$10.95.<sup>14</sup> Bull Smoke  
 12 offers individual disposable “Buckshot” e-cigarettes for \$5.00 each, and a five pack  
 13 of cartridges for its rechargeable e-cigarettes for \$12.99.<sup>15</sup>

14  
 15  
 16 <sup>10</sup> <http://www.whitecloudelectroniccigarettes.com/disposable-ecigarettes/fling->  
 17 [originals](http://www.whitecloudelectroniccigarettes.com/disposable-ecigarettes/fling-) (last visited Jan. 9, 2014);  
 18 <http://www.whitecloudelectroniccigarettes.com/ecigarette-cartridges/> (last visited  
 19 Jan. 9, 2014).

20 <sup>11</sup> <http://www.metroecigs.com/prodcat/traditional-tobacco-flavor-disposable->  
 21 [electronic-cigarettes.asp](http://www.metroecigs.com/prodcat/traditional-tobacco-flavor-disposable-) (last visited Jan. 9, 2014).

22 <sup>12</sup> <http://www.v2cigs.com/categories/disposable-electronic-cigarettes> (last  
 23 visited Jan. 9, 2014); <http://www.v2cigs.com/categories/electronic-cigarette->  
 24 [cartridges](http://www.v2cigs.com/categories/electronic-cigarette-) (last visited Jan. 9, 2014).

25 <sup>13</sup> <http://store.misticecigs.com/disposable-electronic-cigarettes/> (last visited Jan.  
 26 9, 2014); <http://store.misticecigs.com/mistic-traditional-5-pack-replacement->  
 27 [cartridges-2-4/](http://store.misticecigs.com/mistic-traditional-5-pack-replacement-) (last visited Jan. 9, 2014).

28 <sup>14</sup> <http://www.kraveit.com/disposable> (last visited Jan. 8, 2014);  
<http://www.kraveit.com/cartridges> (last visited Jan. 8, 2014).

<sup>15</sup> <http://www.bullsmoke.com/buckshot.asp> (last visited Jan. 8, 2014);  
<http://www.bullsmoke.com/cartridges.asp> (last visited Jan. 8, 2014).

1           21. On information and belief, most members of the proposed Class have  
2 bought more than one of Defendant's NJOY products.

3 **II. PUBLISHED STUDIES DEMONSTRATE THE DANGERS AND**  
4 **EXPOSURE TO HEALTH RISKS OF E-CIGARETTES**

5           22. Because of the rapid growth in the use of electronic cigarettes by  
6 consumers in recent years, an increasing number of government agencies and  
7 research facilities has begun to conduct studies concerning the potential health  
8 impact and risks of these devices. These studies have found, *inter alia*, including  
9 with respect to NJOY E-Cigarettes: (a) measurable amounts of carcinogens, toxins  
10 and other contaminants in e-cigarettes that are, or potentially are, disease-causing,  
11 (b) harmful potential side effects of e-cigarettes, and (c) that more study is needed to  
12 determine the full range of health dangers of e-cigarettes.

13           23. In 2009, the United States Food and Drug Administration ("FDA")  
14 conducted a study of two brands of cigarettes, one of which was NJOY.<sup>16</sup> The FDA  
15 tested a number of NJOY products, including menthol and regular samples at a  
16 variety of nicotine strengths.

17           24. The FDA issued a summary of the results of that study,<sup>17</sup> making, *inter*  
18 *alia*, the statements in the following block quotes (language in brackets added):

- 19           • [the] FDA's Center for Drug Evaluation, Office of Compliance  
20 purchased two samples of electronic cigarettes and components from  
21 two leading brands. [These were: NJOY E-Cigarettes with various  
22 cartridges and Smoking Everywhere Electronic Cigarettes with  
23

24 <sup>16</sup> See FDA Evaluation of E-cigarettes, DPATR-FY-09-23, available at  
25 <http://www.fda.gov/downloads/drugs/scienceresearch/ucm173250.pdf> (last visited  
26 Jan. 13, 2014).

27 <sup>17</sup> <http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm173146> (last visited  
28 Jan. 7, 2014).

1 various cartridges.<sup>18]</sup> These samples included 18 of the various  
2 flavored, nicotine, and no-nicotine cartridges offered for use with  
3 these products. These cartridges were obtained in order to test some  
4 of the ingredients contained in them and inhaled by users of electronic  
5 cigarettes.

- 6 • FDA's Center for Drug Evaluation, Division of Pharmaceutical  
7 Analysis (DPA) analyzed the cartridges [including NJOY cartridges]  
8 from these electronic cigarettes for nicotine content and for the  
9 presence of other tobacco constituents, some of which are known to  
10 be harmful to humans, including those that are potentially  
11 carcinogenic or mutagenic.
- 12 • DPA's analysis of the electronic cigarette samples [including those  
13 from NJOY] *showed that the product contained detectable levels of*  
14 *known carcinogens and toxic chemicals to which users could*  
15 *potentially be exposed.* [Emphasis added.]
- 16 • DPA's testing also suggested that *quality control processes used to*  
17 *manufacture these products are inconsistent or non-existent.*  
18 [Emphasis added.]
- 19 • Specifically, DPA's analysis of the electronic cigarette cartridges  
20 from the two leading brands revealed the following:
  - 21 • *Certain tobacco-specific nitrosamines which are human*  
22 *carcinogens were detected in half of the samples tested*  
23 *[including NJOY samples].*

24  
25 <sup>18</sup> For the applicability to NJOY of this and each of the below bullet points  
26 quoted regarding the FDA study, *see* FDA Evaluation of E-cigarettes, DPATR-FY-  
27 09-23, available at <http://www.fda.gov/downloads/drugs/scienceresearch/ucm173250.pdf> (last visited Jan. 13, 2014).

- 1 • *Tobacco-specific impurities suspected of being harmful to*  
2 *humans—anabasine, myosmine, and  $\beta$ -nicotyrine—were*  
3 *detected in a majority of the samples tested [including*  
4 *NJOY samples].*
- 5 • Three different [NJOY] electronic cigarette cartridges with  
6 the same label ["Menthol high"] were tested and each  
7 cartridge emitted a markedly different amount of nicotine  
8 with each puff. The nicotine levels per puff ranged from  
9 26.8 to 43.2 mcg nicotine/100 mL puff.

10 *Id.* (Emphasis added.)

11 25. The FDA issued a contemporaneous consumer health brochure titled,  
12 "FDA Warns of Health Risks Posed by E-Cigarettes,"<sup>19</sup> in which Margaret A.  
13 Hamburg, M.D., commissioner of food and drugs, stated, "The FDA is concerned  
14 about the safety of these products and how they are marketed to the public." The  
15 FDA also issued a safety alert<sup>20</sup> repeating the risks and noting that "[t]hese products  
16 do not contain any health warnings comparable to FDA-approved nicotine  
17 replacement products or conventional cigarettes."

18 26. Indeed, in the FDA's 2009 study, all four of the major tobacco-specific  
19 nitrosamines, N-nitrosonicotine (NNN), N-nitrosoanabasine (NAB), N-  
20 nitrosoanatabine (NAT) and 4-(methylnitrosamino)-1-(3-pyridyl)-1-butanone  
21 (NNK), were found in NJOY cartridges.

22 27. The health risks and unknowns concerning electronic cigarettes are  
23 compounded by the reality that e-cigarette users smoke differently than traditional  
24

25 <sup>19</sup> Retrieval at [http://www.fda.gov/ForConsumers/ConsumerUpdates/](http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm173401.htm)  
26 [ucm173401.htm](http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm173401.htm) (last visited Jan. 7, 2014).

27 <sup>20</sup> Retrieval at [http://www.fda.gov/NewsEvents/Newsroom/](http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm173222.htm)  
28 [PressAnnouncements/ucm173222.htm](http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm173222.htm) (last visited Jan. 7, 2014).

1 smokers. For example, a study of eight traditional and four electronic cigarettes  
2 including certain NJOY products found, *inter alia*, that, for the NJOYs, they  
3 “required a stronger vacuum [inhalation strength] to smoke than conventional  
4 [tobacco] brands.” Trtchounian, A., *Conventional and Electronic cigarettes (e-*  
5 *cigarettes) have different smoking characteristics*, Nic. & Tob. Res., Vol. 12, No. 9  
6 (Sept. 2010), at 911.<sup>21</sup> (Emphasis added.) The study states, “the effects of this on  
7 human health could be adverse.” *Id.* at 905. According to researchers, as a general  
8 matter, stronger puffing has the potential for “leading to cancer in the deeper lung  
9 regions.” *Lung Deposition Analyses of Inhaled Toxic Aerosols in Conventional and*  
10 *Less Harmful Cigarette Smoke: A Review*, International Journal of Environmental  
11 Research and Public Health, September 23, 2013.<sup>22</sup>

12 28. Since the FDA released the results of its 2009 study of NJOY and  
13 Smoking Everywhere Electronic Cigarettes and its concomitant warning concerning  
14 e-cigarettes generally, new studies have been emerging discussing the risks and  
15 dangers of e-cigarettes. These studies have concerned a variety of brands and  
16 products, but, because e-cigarettes generally operate in a similar manner, and  
17 contain similar primary ingredients, even those studies which are not identified  
18 below as directly having reviewed NJOY products are relevant hereto.

19 29. E-cigarettes are a subject of concern to major international entities.  
20 According to a presentation given by the World Health Organization (“WHO”) to  
21 the European Parliament at a Workshop on Electronic Cigarettes on May 7, 2013,  
22 “electronic cigarettes are a controversial issue for which additional studies and  
23

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24  
25 <sup>21</sup> Retrieval at <http://edge.rit.edu/content/P12056/public/e%20cig%20vs%20conventional%20cig.pdf> (last visited Jan. 14, 2014).

26 <sup>22</sup> Retrieval at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3799535/> (last  
27 visited Jan. 14, 2014).

evidence are needed.” That presentation referenced recent findings from Turkey that:

*indicate that propylene glycol and tobacco specific N-nitrosamines, a powerful carcinogen, were found in the majority of samples.* Toxins from the e-cigarette averaged around 20% of those of a regular cigarette. It was also found that similarly labeled ENDS [Electronic Nicotine Delivery Systems] cartridges emit different amounts of nicotine, and a nicotine overdose may occur which can have serious side effects. *There are currently no studies available on safety and efficacy of long-term e-cigarettes use.*

30. As recently as July 2013, the WHO stated that “[m]ost ENDS [Electronic Nicotine Delivery Systems] contain large concentrations of propylene glycol, which is a known irritant when inhaled,” that “[t]he testing of some of these products also suggests the presence of other toxic chemicals, aside from nicotine,” and that the safety of these devices “has not been scientifically demonstrated.”<sup>23</sup>

31. Numerous other studies have been performed by universities and other research centers, and have reported similar concerns about the potential for health risks associated with electronic cigarettes.

32. For example, a 2013 report titled *Electronic Cigarettes – an Overview*, by the German Cancer Research Center,<sup>24</sup> which was based on a comprehensive review of literature in the field, found in summary as to “Product characteristics” (the following bullet pointed paragraphs are block quoted text):

- E-cigarettes cannot be rated as safe at the present time.

<sup>23</sup> Retrieval at [http://www.who.int/tobacco/communications/statements/electronic\\_cigarettes/en/](http://www.who.int/tobacco/communications/statements/electronic_cigarettes/en/) (last visited Jan. 7, 2014).

<sup>24</sup> Published in Red Series, Tobacco Prevention and Tobacco Control, Vol. 19: Electronic Cigarettes – An Overview (Heidelberg 2013), available at <http://www.dkfz.de/en/presse/download/RS-Vol.19-E-Cigarettes-EN/pdf>.



- 1 • Consumers do not have reliable information on product quality.
- 2 • Electronic cigarettes have various technical flaws (leaking
- 3 cartridges, accidental intake of nicotine when replacing cartridges,
- 4 possibility of unintended overdose.)
- 5 • Some manufacturers provide insufficient and partly wrong
- 6 information about their liquids.

7 As to “Health Effects,” the summary stated (the following bullet pointed paragraphs  
8 are block quoted text):

- 9 • The liquids contain ingredients that on short-term use irritate air-  
10 ways and may lead to allergic reactions and which may be harmful  
11 to health when inhaled repeatedly over a prolonged period of time.
- 12 • The aerosol of some liquids contains harmful substances  
13 (formaldehyde, acetaldehyde, acrolein, diethylene glycol, nickel,  
14 chromium, lead).
- 15 • The functionality of electronic cigarettes can vary considerably  
16 (aerosol production, nicotine delivery into aerosols).
- 17 • Adverse health effects for third parties exposed cannot be excluded  
18 because the use of electronic cigarettes leads to emission of fine and  
19 ultrafine inhalable liquid particles, nicotine and cancer-causing  
20 substances into indoor air.

21 *Id.* at viii.

22 33. Among the more specific risks identified in the studies reviewed in that  
23 report by the German Cancer Research Center are that, *inter alia* (the following  
24 bullet pointed paragraphs are block quoted text, the language in brackets has been  
25 added, and all internal citations are omitted):

- 26 • Electronic cigarettes do not extinguish naturally after about ten  
27 puffs like conventional cigarettes, but can be used for hundreds of  
28

1 puffs without a break. When using them as intended, consumers  
2 may therefore get a dangerous amount of nicotine by taking too  
3 many puffs, which may even result in serious symptoms of nicotine  
4 poisoning. *Id.* at 4-5.

- 5 • Not even nicotine-free liquids are necessarily harmless. Their main  
6 ingredients (propylene glycol [which is an ingredient in NJOY],  
7 glycerine [another ingredient in NJOY], flavours) have been  
8 approved for use in food, but this does not necessarily mean that  
9 they are also safe when they are repeatedly inhaled over a prolonged  
10 period of time – as they are when used in electronic cigarettes.  
11 There are currently no studies available on the effects of long-term  
12 use of e-cigarettes. *Id.* at 7.
- 13 • To date, only [a] few studies have been conducted on potential  
14 health risks associated with inhaling propylene glycol [an ingredient  
15 in NJOY] – as one does when using electronic cigarettes as  
16 intended. According to these studies, inhaling propylene glycol  
17 may affect airways. Short-term exposure to propylene glycol in  
18 indoor air (309 mg/m<sup>3</sup> for one minute) already causes irritations in  
19 the eyes, throat and airways. Long-term exposure to propylene  
20 glycol in indoor air may raise children's risk of developing asthma.  
21 People who have frequently been exposed to theatrical fogs  
22 containing propylene glycol are more likely to suffer from  
23 respiratory, throat and nose irritations than do unexposed people.  
24 We may therefore assume that the use of e-cigarettes, which  
25 involves inhaling propylene glycol vapours several times daily, may  
26 cause respiratory irritations. This applies, in particular, to  
27 individuals with impaired airways and to smokers who switch to e-  
28

1 cigarettes or use them additionally, because smokers usually already  
2 have impaired airways. *Id.*

- 3 • Glycerine [an ingredient in NJOY] is considered generally safe for  
4 oral intake and is used in food production as a humectant and as a  
5 solution carrier in flavours. However, this does not necessarily  
6 mean that it is also safe for inhalation – as in e-cigarettes if used as  
7 intended. These concerns are not unfounded. The specialist journal  
8 Chest reports about a case study of a patient with lipoid pneumonia  
9 caused by glycerine-based oils from the aerosol of electronic  
10 cigarettes. The link appears to be clear, since symptoms  
11 disappeared when the patient stopped using electronic cigarettes.  
12 *Id.* at 7-8.

- 13 • Individual liquids [including NJOY, per the FDA study noted above  
14 and cited in the instant article] were found to contain small amounts  
15 of nitrosamines. In addition, formaldehyde, acetaldehyde and  
16 acrolein were measured in the aerosol of various e-cigarettes,  
17 although considerably less than in cigarette smoke. Formaldehyde  
18 and acrolein were only found in glycerine-containing liquids [NJOY  
19 contains glycerine]; they probably form upon heating of glycerine.  
20 Acrolein is absorbed by the user: A decomposition product of  
21 acrolein was detected in the urine of e-cigarettes users, although  
22 considerably less than after smoking conventional cigarettes. In  
23 addition, nickel and chromium were detected in the aerosol, with  
24 higher levels of nickel measured than it is known to be present in  
25 cigarette smoke. The aforementioned substances have been  
26 classified by the German Research Foundation (Deutsche  
27 Forschungsge- meinschaft, DFG) and the International Agency for  
28

Research on Cancer (IARC) as carcinogenic. Since there is no safe threshold value for these substances, it cannot be excluded that using electronic cigarettes increases cancer risk, even though these substances may be present in very small amounts. *Id.*

- Data on the impact of e-cigarette use on pulmonary function are not conclusive. A study involving 30 participants reports adverse effects on pulmonary function after using an electronic cigarette for five minutes; however, the long-term pulmonary effects of e-cigarette use are unknown at the present time. *Id.*
- There are currently no studies available on the effects of long-term use of e-cigarettes. *Id.* at 7.

34. Certain of the many studies considered in the above referenced Red Series review are among those discussed in more detail in the individual study references below. One such study was *Short-term Pulmonary Effects of Using an Electronic Cigarette*, published in June 2012 in *Chest*, the journal of the American College of Chest Physicians. That study expressly found both that electronic cigarettes had adverse health effects and the need for further research:

***E-cigarettes assessed in the context of this study were found to have immediate adverse physiologic effects after short-term use that are similar to some of the effects seen with tobacco smoking;*** however, the long-term health effects of e-cigarette use are unknown but potentially adverse and worthy of further investigation. [Emphasis added.]

35. A French article published in the consumer publication *60 millions de consommateurs* on August 26, 2013, reported that e-cigarettes are potentially carcinogenic. It based its findings upon testing 10 different models of e-cigarettes.<sup>25</sup>

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<sup>25</sup> Quotes in this paragraph are derived from B. McPartland, "Report: e-cigarettes are 'potentially carcinogenic'" an article published in *The Local*, a source (continued...)

1 It found “carcinogenic molecules in a significant amount” in the vapour produced in  
2 the products. It further determined that “[i]n three cases out of 10, for products with  
3 or without nicotine, the content of formaldehyde was as much as the levels found in  
4 some conventional cigarettes.” It found acrolein, a toxic molecule emitted in  
5 quantities “that exceeded the amount found in the smoke of some cigarettes.”  
6 “Potentially toxic” trace metals were also discovered in some of the models.

7 36. A study by scientists at the University of California Riverside,  
8 published on March 20, 2013 in the journal PLoS One, found that:

9 one [unidentified] brand of e-cigarettes generates aerosols containing  
10 micron particles comprised of tin, silver, iron, nickel, aluminum and  
11 silicate, as well as nanoparticles containing tin, chromium and nickel,  
12 which are elements that cause respiratory distress and disease. Those  
13 metals come from the wires inside the cartridge, while silicate particles  
14 may originate from the fiber glass [*sic*] wicks.

15 Williams, M., *et al.*, *Metal and Silicate Particles Including Nanoparticles Are*  
16 *Present in Electronic Cigarette Cartomizer Fluid and Aerosol*, PLoS ONE 8(3):  
17 e57987 (2013).

18 37. Also, according to that study by the University of California at  
19 Riverside:

20 A total of 22 elements were identified in EC [electronic cigarette]  
21 aerosol, and three of these elements (lead, nickel, and chromium)  
22 appear on the FDA’s “harmful and potentially harmful chemicals” list.  
23 Lead and chromium concentrations in EC aerosols were within the  
24 range of conventional cigarettes, while nickel was about 2–100 times  
25 higher in concentration in EC aerosol than in Marlboro brand cigarettes

26 (...continued)

27 for “France’s News in English,” on August 26, 2013, describing this study.

28

(Table 1). Adverse health effects in the respiratory and nervous systems can be produced by many of the elements in Table 1, and many of the respiratory and ocular symptoms caused by these elements have been reported by EC users in the Health and Safety Forum on the Electronic Cigarette Forum website (<http://www.e-cigarette-forum.com/forum/health-safety-e-smoking/>). Although [a table reflecting this research] was constructed to emphasize the effects of the elements found in aerosol on the respiratory system, other systems, such as the cardiovascular and reproductive systems, can be affected by most of the elements in EC aerosol. ***EC consumers should be aware of the metal and silicate particles in EC aerosol and the potential health risks associated with their inhalation.***

*Id.* at 5 (emphasis added).

38. A study published on September 23, 2013 in the International Journal of Environmental Research and Public Health titled, *Lung Deposition Analyses of Inhaled Toxic Aerosols in Conventional and Less Harmful Cigarette Smoke: A Review*, found that there were potential risks associated with e-cigarettes that were not a factor in traditional cigarettes, including “compensatory smoking (*i.e.*, stronger puffing) leading to cancer in the deeper lung regions,” and that “[u]nknown reactions between some components in newly designed filters (or other new additives) may lead to the production of carcinogens or other toxicants.”

39. Most NJOY E-Cigarettes contain nicotine. On December 15, 2013, the American Society for Cell Biology issued a press release concerning the findings of researchers at Brown University, who determined that, “Nicotine, the major addictive substance in cigarette smoke, contributes to smokers’ higher risk of developing atherosclerosis, the primary cause of heart attacks,” and that, as such, e-



1 cigarettes, which contain nicotine, as most NJOY E-Cigarettes do, “may not  
2 significantly reduce risk for heart disease.”<sup>26</sup>

3 **III. DEFENDANT’S ADVERTISEMENTS FOR ITS NJOY**  
4 **E-CIGARETTES ARE MATERIALLY DECEPTIVE, FALSE**  
5 **AND MISLEADING**

6 40. Defendant has carried out a consistent and widespread campaign of  
7 deceptively promoting its NJOY E-Cigarettes. Its core marketing statement that its  
8 products provide “*everything you like about smoking without the things you don’t*”  
9 (emphasis added), or similar variations, is false and misleading given the studies  
10 discussed above that have found carcinogens, toxins, and other potentially harmful  
11 impurities, including certain of those found in traditional tobacco cigarettes, in  
12 electronic cigarettes, including NJOY E-Cigarettes. It is also false and misleading  
13 given the content of the NJOY products because there is still insufficient research  
14 for NJOY to assert or convey that NJOY products do not pose long term health  
15 dangers as smoking traditional cigarettes does. Defendant’s statements and  
16 omissions have occurred in at least four forms, all of which constitute “advertising.”  
17 These include: its packaging; inserts to its packaging and shipping materials; its  
18 print advertisements; and its website through which it directly sells its NJOY E-  
19 Cigarettes and related products to the public. Defendant’s pervasive advertising  
20 message conveys the impression that, unlike traditional tobacco cigarettes, which  
21 contain carcinogens, toxins and other impurities and cause disease (i.e., “the things  
22 you don’t” like about cigarettes), NJOY E-Cigarettes are “without” those things and  
23

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24 <sup>26</sup> American Society for Cell Biology, “Nicotine drives cell invasion that  
25 contributes to plaque formation in coronary arteries, Research indicates e-cigarettes  
26 may not significantly reduce risk for heart disease,” Dec. 15, 2013, available at  
27 [http://www.eurekalert.org/pub\\_releases/2013-12/asfc-ndc112613.php](http://www.eurekalert.org/pub_releases/2013-12/asfc-ndc112613.php) (last accessed  
28 Jan. 7, 2014).

1 do not carry that same risk of disease. As demonstrated above in Section II,  
2 however, this is materially deceptive, false and misleading given the information  
3 revealed by studies that not only are e-cigarettes such as NJOY E-Cigarettes  
4 potentially dangerous to your health but that they also may carry many of the same  
5 risks of disease as traditional tobacco cigarettes, including as a result of the tobacco  
6 specific nitrosamines they contain that are powerful carcinogens, which is not  
7 disclosed by Defendant.

8 41. Beginning in 2007, as shown below, NJOY packaging bore the slogan  
9 “ALL THE PLEASURES OF SMOKING WITHOUT ALL THE PROBLEMS”<sup>27</sup>:



22 42. NJOY’s pattern of deceptive marketing continues today, including  
23 through use of its “everything you like about smoking without the things you don’t”  
24

25  
26 <sup>27</sup> [http://tobaccoproducts.org/index.php/NJoy\\_Electronic\\_Cigarette](http://tobaccoproducts.org/index.php/NJoy_Electronic_Cigarette) (last visited  
27 12/14/13) (showing picture of packaging with tagline, dated 2007, and stating that  
28 each product was introduced in 2007).

1 slogan (or the like) in its advertisements, and other false, misleading and deceptive  
2 statements, as discussed below.

3 43. The packages for NJOY's current main product, NJOY Kings,  
4 introduced to the market in December 2012, are designed to look like they contain  
5 traditional cigarettes, and the NJOY Kings smoking devices mirror traditional  
6 cigarettes and, as such, are intended to capitalize on consumers' desire to smoke but  
7 yet avoid the health dangers of traditional tobacco cigarettes. For example, as  
8 described more fully below, one of NJOY's commonly used taglines includes the  
9 statements: "Finally, smokers have a real alternative," and "Cigarettes, you've met  
10 your match."

11 44. NJOY's current packaging, depicted below, through warnings that are  
12 fraught with material omissions, conveys the impression that the product contains no  
13 meaningful health risks other than possibly those that are a direct result of  
14 nicotine:<sup>28</sup>



<sup>28</sup> Photographs taken November 21, 2013 of products purchased on that date.

1  
2 45. The small print on the back of the package is significant not only  
3 because its font is so small as to be difficult for many people to read, but also for its  
4 failure to list the ingredients of the product. While Defendant does describe what it  
5 claims are its ingredients on its website (which description is itself false and  
6 misleading as described below), by omitting the ingredients from the label,  
7 Defendant denies consumers at the point of sale the opportunity to decide for  
8 themselves whether the chemicals used are substances they are willing to risk  
9 inhaling. For example, by omitting the ingredients, Defendant hides the fact that  
10 NJOY E-Cigarettes contain propylene glycol, a product found to cause throat  
11 irritation and induce coughing,<sup>29</sup> and thus no longer used by certain of NJOY's  
12 competitors in their e-cigarettes. Moreover, as discussed below, omitting the  
13 ingredients on the package conceals the dangers associated with the chemicals in its  
14 NJOY E-Cigarettes, which are described in the studies referenced above.

15 46. The text on the back of the NJOY King package reads, in its entirety:  
16 WARNING: NJOY products are not smoking cessation products and  
17 have not been tested as such. The U.S. FDA has not approved NJOY  
18

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19 <sup>29</sup> *Electronic Cigarettes – An Overview*, published in the Red Series Tobacco  
20 Prevention and Tobacco Control, Vol. 19 (Heidelberg 2013), referenced in ¶¶ 32-33  
21 above, citing Wieslander G., *Experimental exposure to propylene glycol mist in*  
22 *aviation emergency training: acute ocular and respiratory effects*, *Occup Environ*  
23 *Med* 58: 649-655, Choi H, (2010), *Common household chemicals and the allergy*  
24 *risks in pre-school age children*, *PLoS One* 5: e13423, and Moline JM, *Health*  
25 *effects evaluation of theatrical smoke, haze and pyrotechnics* (2000). *See also* New  
26 Hampshire Department of Environmental Services, *Ethylene Glycol and Propylene*  
27 *Glycol: Health Information Summary*, Environmental Fact Sheet,  
28 <http://des.nh.gov/organization/commissioner/pip/factsheets/ard/documents/ard-ehp-12.pdf> (last visited Jan. 7, 2014) (stating that “Human volunteers exposed to high levels of propylene glycol mist for a short time had increased levels of eye and throat irritation, and cough.”).

1 products for any use and they are not intended to diagnose, cure,  
2 mitigate, treat, or prevent any disorder, disease, or physical or mental  
3 condition. NJOY products contain nicotine, a chemical known to the  
4 State of California to cause birth defects or other reproductive harm.  
5 Nicotine is addictive and habit forming, and it is very toxic by  
6 inhalation, in contact with the skin, or if swallowed. Ingestion of the  
7 non-vaporized concentrated ingredients in the cartridges can be  
8 poisonous. Physical effects of nicotine may include accelerated heart  
9 rate and increased blood pressure. If the cartridge is swallowed, seek  
10 medical assistance immediately. NJOY products are intended for use  
11 by adults of legal smoking age (18 or older in California), and not by  
12 children, women who are pregnant or breastfeeding, or persons with or  
13 at risk of heart disease, high blood pressure, diabetes, or taking  
14 medicine for depression or asthma. NJOY products may not be sold to  
15 minors. Identification of all persons under 26 will be required before  
16 purchase. Keep out of reach of children.

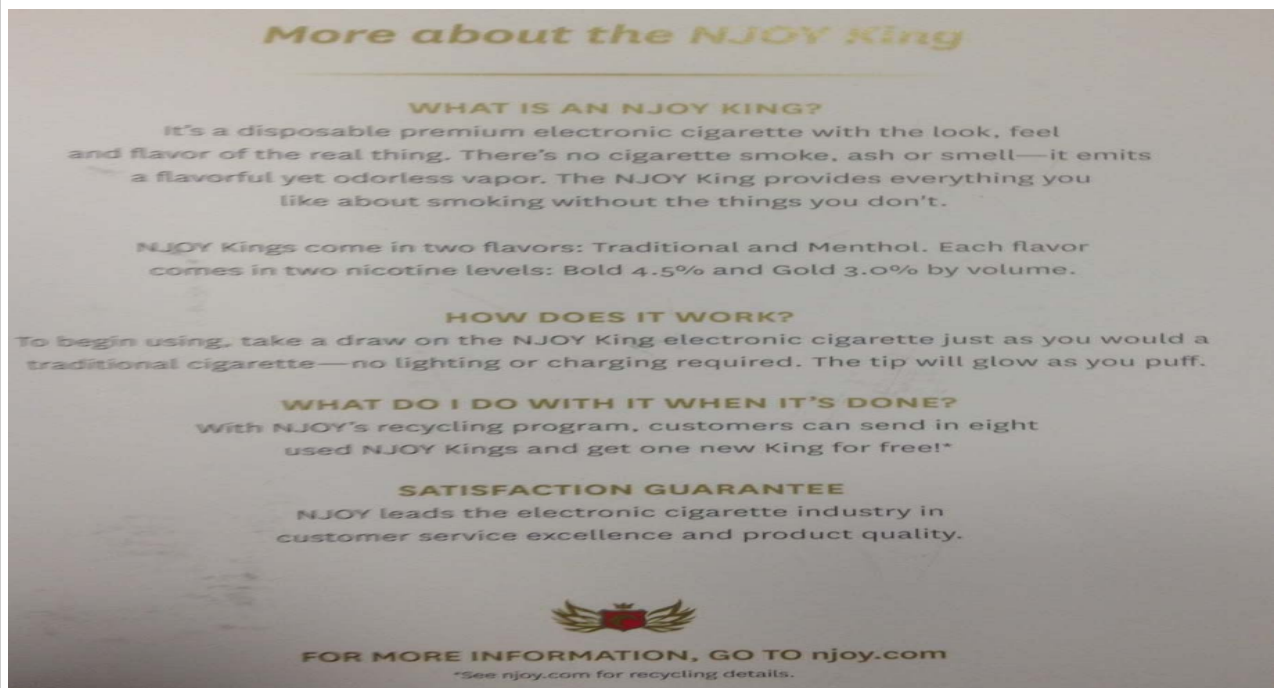
17 47. By warning of risks relating to nicotine, and the risks that may arise if  
18 the concentrated contents of the cartridge are swallowed without being vaporized,  
19 this packaging implies that those are the only health-related risks that relate to  
20 NJOY E-Cigarettes. This is deceptive and misleading, as the package omits  
21 reference to the other carcinogens, toxins and impurities, including carcinogenic  
22 tobacco-specific nitrosamines found in NJOY E-Cigarettes as discussed above in  
23 Section II. It also does not reference the difference in inhalation behavior between  
24 vaping and traditional smoking (described herein) that may cause additional  
25 problems for persons who use e-cigarettes, including NJOY E-Cigarettes.

26 48. As demonstrated below, Defendant's pervasive advertisements  
27 representing that NJOY E-Cigarettes offer all of the positive aspects of smoking/  
28

cigarettes without the negative ones are materially deceptive, false and misleading given the studies discussed above in Section II and fail to disclose that such research and studies have raised significant concerns about the health risks of NJOY E-Cigarettes, including but not limited to:

- the presence of nitrosamines, toxins, and other impurities, including certain of those found in tobacco cigarettes, that are dangerous to the user's health and cause disease;
- the harmful impact to lung capacity as a result of the chemicals, including propylene glycol, contained therein that are present in NJOY E-Cigarettes;
- that NJOY E-Cigarettes require that the user take significantly stronger puffs than the puffs required for a traditional tobacco cigarette, and that this could be harmful to health;
- and other potentially dangerous but unknown health effects caused by the long term use of e-cigarettes, including NJOY E-Cigarettes.

49. For example, one package insert for NJOY E-Cigarettes is as follows:





1           50. The statements in the insert above, including that “The NJOY King  
2 provides everything you like about smoking without the things you don’t,” are  
3 deceptive, false and misleading for the reasons stated in ¶ 48, *supra*.

4           51. Another insert found in NJOY’s packaging in 2013 instructs readers,  
5 “Be sure to tell your friends and family about the positive impact that NJOY  
6 products are having on your life,” and states that “the NJOY King gives you  
7 everything you love about the smoking experience”:

8 **INTRODUCING THE NJOY KING ELECTRONIC CIGARETTE.**

9 From its size, feel and look to its amazing taste, the NJOY King gives you everything you love about the smoking experience.  
10 So, go ahead, give it a try.

11 To begin take one long slow puff on the cigarette – no lighting or charging required. The tip will light up red each time you puff.

12 Each NJOY King lasts up to two packs.\*

13 You’ll know it’s time for a new one when the red light blinks on and off.

14 NJOY recycles ♻️. Send NJOY eight used NJOY King’s electronic cigarettes and we’ll send you one FREE NJOY King!

15 For more information, go to [njoy.com](http://njoy.com).

16 NJOY Kings are available in two flavors, traditional and menthol, with two nicotine levels –  
17 Gold (4.5% nicotine by volume) and Gold (3.0% nicotine by volume).

18 **SAISFACTION GUARANTEED**

19 NJOY leads the electronic cigarette industry in product quality and customer service  
20 excellence. Visit [njoy.com](http://njoy.com) for our 30-Day Money-Back Guarantee!

21 If your NJOY King isn’t working properly, or you are not 100% satisfied,

22 **DO NOT RETURN IT TO THE STORE.** For service and help contact:

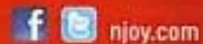
23 NJOY at [CS@NJOY.COM](mailto:CS@NJOY.COM) or call 1.888.669.6569.

24 Return/Exchange items should be sent to the following address:

25 NJOY Customer Service  
26 5211 N Kierland Blvd, Suite 200  
27 Scottsdale, AZ 85254

28 Results may vary depending on usage.

**BE SURE TO  
TELL YOUR FRIENDS  
AND FAMILY ABOUT  
THE POSITIVE IMPACT  
NJOY PRODUCTS ARE  
HAVING ON YOUR LIFE.**



18           52. For the reasons noted above in ¶ 48, these representations are  
19 deceptive, false and misleading.

20           53. As shown in the picture below, in one 2013 ad, NJOY states, under the  
21 lead line, “The most amazing thing about this cigarette? It isn’t one,” that with the  
22 NJOY King, “You get to keep all the things you like about smoking while losing the  
23 things you don’t.”

24 //

25 //

26 ///



54. Another ad shown below, under the lead line, "Try something new in bed. Finally smokers have a real alternative," asserts "It's the first electronic cigarette where you get to keep the things you like about smoking, while losing the things you don't. What's not to love? Cigarettes, you've met your match."

///



55. Another ad, shown below, contains the same text, but under the lead line, “Start a new relationship,” says, “you get to keep the things you like about cigarettes while losing the things you don’t. What’s not to love?”

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**START A NEW RELATIONSHIP.**

FINALLY, SMOKERS HAVE A REAL ALTERNATIVE.  
INTRODUCING THE NJOY KING ELECTRONIC CIGARETTE.

It's the first electronic cigarette with the look, feel and flavor of the real thing. So you get to keep the things you like about smoking, while losing the things you don't. What's not to love?

**CIGARETTES, YOU'VE MET YOUR MATCH.**

AVAILABLE AT CONVENIENCE STORES NATIONWIDE.

[njoy.com](http://njoy.com)

© 2003 NJOY, Inc. All rights reserved. Cigarette-like taste, smooth, mild draw. Not a tobacco cigarette. 50+ mg nicotine/tar (av. per cigarette by FTC method).

56. The statements in the advertisements in ¶¶ 53-55 above, including that with NJOY E-Cigarettes, “You get to keep all the things you like about smoking



1 while losing the things you don't," are deceptive, false and misleading for the  
2 reasons stated in ¶ 48, *supra*.

3 57. In addition, advertising like the one shown below gives the impression  
4 that NJOY E-Cigarettes are a smoking cessation device:



22 58. The phrase "Resolution Solution" clearly refers to smokers' New Years  
23 resolutions to quit smoking. This conveys the impression that NJOY E-Cigarettes  
24 are, in fact, a smoking cessation aid. Yet, in multiple places, including as referred to  
25 in ¶ 46, *supra* (but omitted in this particular advertisement), Defendant states that  
26 NJOY E-Cigarettes are not a smoking cessation device. Thus, this advertisement is  
27 deceptive, false and misleading. This misrepresentation is particularly significant  
28

1 because the reason that NJOY states elsewhere that it is not a smoking cessation  
 2 device is to avoid regulation under the Food, Drug and Cosmetic Act (“FDCA”)  
 3 which has been found, in a lawsuit to which NJOY was a party, to grant the FDA  
 4 the power to regulate smoking cessation devices. *See Smoking Everywhere, Inc. v.*  
 5 *United States FDA*, 680 F. Supp. 2d 62 (D.D.C. 2010), and, upholding that decision,  
 6 *Sottera, Inc. v. FDA*, 627 F.3d 891 (D.C. Cir. 2010).

7 59. In addition, NJOY’s promotion of its NJOY E-Cigarettes as a “real  
 8 alternative” for smokers in its various ads continues to convey the deceptive, false  
 9 and misleading impression discussed above that its NJOY E-Cigarettes are  
 10 “without” the things you don’t like about traditional tobacco cigarettes and therefore  
 11 carry no risk of and do not cause disease as traditional tobacco cigarettes do, which  
 12 is false in light of the material information discussed in the studies *supra*, in Section  
 13 II, which are not disclosed by Defendant.

14 60. Each example of NJOY’s packaging, inserts and advertising contains  
 15 an address for NJOY’s website, which as described below, is also misleading in its  
 16 representations and omissions about NJOY’s products.

17 61. The following product description, stating, “It provides everything you  
 18 like about smoking without the things you don’t,” was taken from Defendant’s  
 19 website:<sup>30</sup>

## 20 Product Description

### 21 What Is An NJOY King?

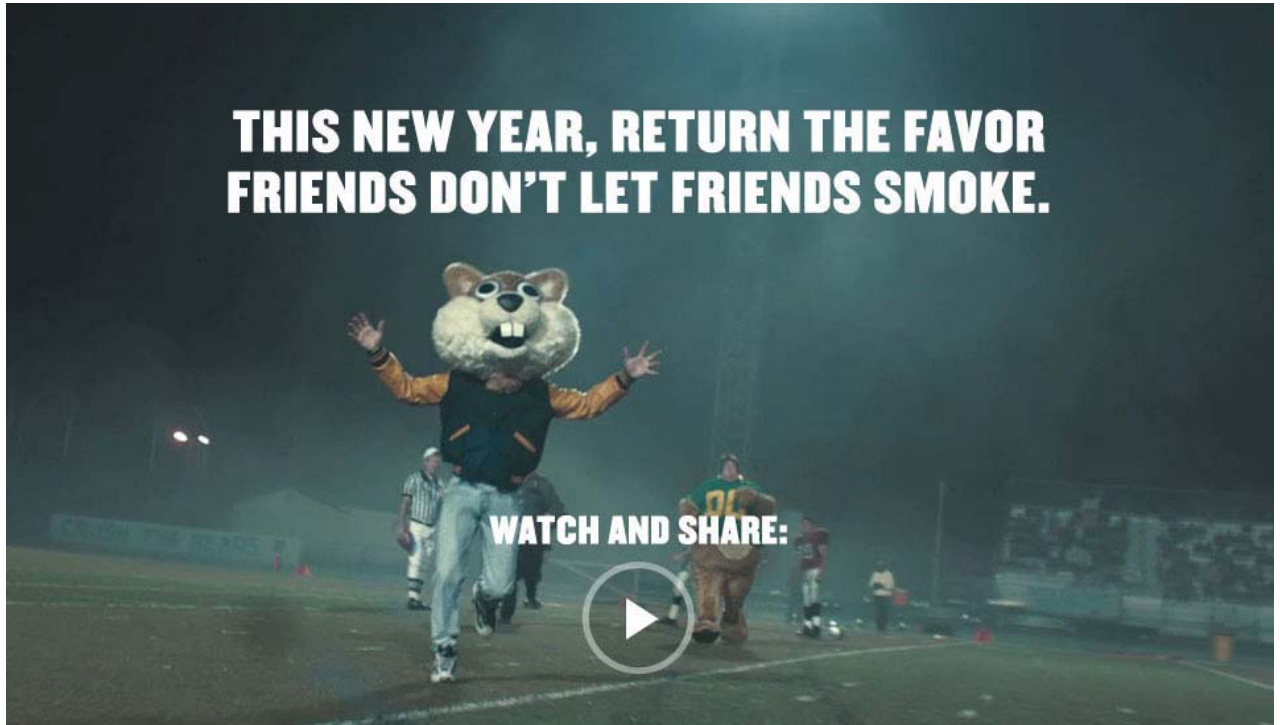
22 It’s a premium electronic cigarette with the look, feel and flavor of the real thing, but without the tobacco smoke. Instead it emits a  
 23 flavorful but odorless vapor. It provides everything you like about smoking without the things you don’t. No tobacco smoke or cigarette  
 24 smell.  
 25

26 <sup>30</sup> NJOY, <http://www.njoy.com/njoy-kings/njoy-king-3-pack.html> (last visited  
 27 Jan. 10, 2013).  
 28



62. As described above, the statement, “It provides everything you like about smoking without the things you don’t,” is deceptive, false and misleading for the reasons stated in ¶ 48, *supra*.

63. Beginning in approximately early January 2014, Defendant added a new slogan to its marketing (pictured below): “Friends Don’t Let Friends Smoke.”



64. A reasonable consumer viewing this advertisement would believe it to mean that “friends don’t let friends smoke” because traditional tobacco cigarettes contain carcinogens and toxins and smoking carries the risk of disease, but that friends should encourage friends to use NJOY because NJOY E-Cigarettes do not contain carcinogens or toxins as tobacco cigarettes do and do not therefore carry the same or similar risk of disease. This is another deceptive, false and misleading advertisement for the reasons stated in ¶ 48, *supra*.

65. On its website, Defendant has a Frequently Asked Questions page.<sup>31</sup> In one of the sections, Defendant states that “[t]he primary ingredients [of NJOY E-

<sup>31</sup> NJOY, <http://www.njoy.com/faqs> (last visited Jan. 7, 2014).

1 Cigarettes] are glycerin and propylene glycol, and the secondary ingredients are  
2 nicotine and flavors to replicate the taste of traditional smoking,” and goes on to  
3 provide deceptive, false and misleading statements about those ingredients.<sup>32</sup> With  
4 respect to propylene glycol and glycerin, Defendant’s FAQ page on its website  
5 states:

- 6 • Propylene Glycol - The Food and Drug Administration (FDA) has  
7 determined propylene glycol to be “***generally recognized as safe***”  
8 for use in food, and propylene glycol is used in cosmetics and  
9 medicines. [Emphasis added.] It is used in food coloring and  
10 flavoring, as an additive to keep food, medicines and cosmetics  
11 moist, and in machines that simulate smoke, although usage in  
12 simulating smoking devices is not currently included in the list of  
13 uses recognized by the FDA. In NJOY, propylene glycol  
14 functions to provide the vapor mist that looks like smoke and to  
15 suspend flavor. [Emphasis added.]
- 16 • Glycerin - The FDA has determined glycerin to be “***generally***  
17 ***recognized as safe***” for use in food, and glycerin is commonly  
18 used in foods, beverages, medical and pharmaceutical  
19 applications, such as cough drops, although usage in simulating  
20 smoking devices is not currently included in the list of uses  
21 recognized by the FDA. [Emphasis added.]

22 66. By stating that the FDA considers these substances “generally  
23 recognized as safe” for consumption in food, Defendant creates the false and  
24 misleading impression that these substances carry no risk and are safe as used for  
25 inhalation in NJOY E-Cigarettes, as discussed above. However, the gastrointestinal  
26

---

27 <sup>32</sup> *Id.*

1 system processes foreign matter differently than the respiratory system, and  
 2 ingredients that may be safe when digested may not be safe when inhaled, especially  
 3 with long term use. The additional statement that “usage in simulating smoking  
 4 devices is not currently included in the list of uses recognized by the FDA,” is itself  
 5 misleading in the absence of reference to the studies finding that these ingredients  
 6 may not be safe when inhaled, including, but not limited to, the studies referenced in  
 7 the review of the literature, *Electronic Cigarettes – An Overview*, published in the  
 8 Red Series Tobacco Prevention and Tobacco Control, Vol. 19 (Heidelberg 2013),  
 9 referenced in ¶¶ 32-33 above. For example, that paper stated: “Glycerine is  
 10 considered generally safe for oral intake and is used in food production as a  
 11 humectant and as a solution carrier in flavours. However, this does not necessarily  
 12 mean that it is also safe for inhalation – as in e-cigarettes if used as intended.” *Id.* at  
 13 7 - 8.

14 67. As to the other ingredients it describes on the FAQ page of the NJOY  
 15 website, Defendant states, with respect to nicotine that:

- 16 • Nicotine - is an alkaloid found in ***certain plants, predominately***  
 17 ***tobacco, and in lower quantities, tomatoes, potatoes, eggplants,***  
 18 ***cauliflower, bell-peppers, and some teas.***

19 68. To draw a parallel between nicotine in e-cigarettes and tomatoes,  
 20 potatoes, eggplants, cauliflower, bell-peppers and teas is deceptive and misleading,  
 21 as demonstrated by the studies cited *supra* in Section II.

22 69. Finally, Defendant lists the other ingredients of NJOY as unspecified  
 23 “Natural and Artificial flavors,” as to which it says:

- 24 • Natural and Artificial Flavors - ***determined to be safe for use in***  
 25 ***food products.***

1           70. This is deceptive and misleading because the website does not disclose  
2 what those “flavors” are, nor does it acknowledge that safety for use in food  
3 products does not denote safety for use in inhaled products, as described above.

4           71. An additional deception by NJOY is that it states on its website:  
5           Regulatory Compliance: NJOY is the only e-cigarette company  
6 to have had its marketing practices reviewed by Federal District  
7 and Appellate Courts and found to have not made or implied  
8 health claims. The FDA is prohibited from restricting NJOY  
9 product imports as a drug or drug delivery device. Other  
10 electronic cigarettes may continue to have importation risks.

11           72. This is a misstatement of the District’s and Appellate Courts’ rulings in  
12 the cases at issue. The only Federal District and Appellate Court decisions  
13 concerning NJOY’s marketing do not hold that NJOY’s marketing practices do not  
14 make or imply health claims. Rather, these cases hold that NJOY has not marketed  
15 its products as “articles intended for use in the diagnosis, cure, mitigation, treatment,  
16 or prevention of disease in man or other animals” or “articles ... intended to affect  
17 the structure or any function of the body of man or other animals,” such that NJOY  
18 would be subject to the “drug/device” provisions of the Food, Drug, and Cosmetic  
19 Act (“FDCA”). *See Smoking Everywhere, Inc. v. United States FDA*, 680 F. Supp.  
20 2d 62 (D.D.C. 2010), and, upholding that decision, *Sottera, Inc. v. FDA*, 627 F.3d  
21 891 (D.C. Cir. 2010). Notably, these rulings were issued before NJOY began to  
22 market its NJOY E-Cigarettes as the “Resolution Solution,” an obvious reference to  
23 tobacco smokers’ resolutions to quit smoking in the new year. To the extent that the  
24 statement implies that the FDA or courts have approved NJOY’s past advertising or  
25 changes to its advertising after the opinions, it is further misleading.

**CLASS DEFINITION AND ALLEGATIONS**

73. Plaintiff brings this action as a class action pursuant to Rule 23(a) and (b)(2) and/or (b)(3) of the Federal Rules of Civil Procedure (“Rule”) for the purpose of asserting the claims alleged in this Complaint on a common basis. Plaintiff brings this action on behalf of himself and all members of the following class comprised of:

**All persons, exclusive of Defendant and its employees, who purchased in or from California, one or more NJOY E-Cigarettes, including components thereof, or cartridges or accessories therefore, sold by Defendant (the “Class”).**

74. Plaintiff reserves the right to modify or amend the definitions of the Class after he has had an opportunity to conduct discovery.

75. ***Numerosity. Rule 23(a)(1).*** The members of the Class are so numerous that their individual joinder is impracticable. Plaintiff is informed and believes that the proposed Class contains at least thousands of purchasers of the NJOY E-Cigarettes who have been damaged by Defendant’s conduct as alleged herein. The number of Class members is unknown to Plaintiff but could be discerned from the records maintained by Defendant.

76. ***Existence of Common Questions of Law and Fact. Rule 23(a)(2).*** This action involves common questions of law and fact, which include, but are not limited to, the following:

77. Whether the statements made by Defendant as part of its advertising for NJOY E-Cigarettes discussed herein are true, or are reasonably likely to deceive, given the omissions of material fact described above:

a. Whether Defendant’s conduct described herein constitutes a deceptive act or practice in violation of the CLRA;

- b. Whether Defendant's conduct described herein constitutes an unlawful, unfair, and/or fraudulent business practice in violation of the UCL;
- c. Whether Defendant's conduct described herein constitutes unfair, deceptive, untrue or misleading advertising in violation of the UCL;
- d. Whether Defendant's conduct constitutes a breach of express warranty;
- e. Whether Plaintiff and the other members of Class are entitled to damages; and
- f. Whether Plaintiff and the Class are entitled to injunctive relief, restitution or other equitable relief and/or other relief as may be proper.

78. **Typicality. Rule 23(a)(3).** All members of the Class have been subject to and affected by the same conduct and omissions by Defendant. The claims alleged herein are based on the same violations by Defendant that harmed Plaintiff and members of the Class. By purchasing NJOY E-Cigarettes during the relevant time period, all members of the Class were subjected to the same wrongful conduct. Plaintiff's claims are typical of the Class' claims and do not conflict with the interests of any other members of the Class. Defendant's unlawful, unfair, deceptive, and/or fraudulent actions and breaches of warranty concern the same business practices described herein irrespective of where they occurred or were experienced.

79. **Adequacy. Rule 23(a)(4).** Plaintiff will fairly and adequately protect the interests of the members of the Class. Plaintiff has retained counsel experienced in complex consumer class action litigation, and Plaintiff intends to prosecute this action vigorously. Plaintiff has no adverse or antagonistic interests to those of the Class.

80. **Injunctive and Declaratory Relief. Rule 23(b)(2).** Defendant's actions regarding the deceptions and omissions regarding NJOY E-Cigarettes are uniform as to members of the Class. Defendant has acted or refused to act on

1 grounds that apply generally to the Class, so that final injunctive relief as requested  
 2 herein is appropriate respecting the Class as a whole.

3 81. ***Predominance and Superiority of Class Action. Rule 23(b)(3).***

4 Questions of law or fact common to the Class predominate over any questions  
 5 affecting only individual members and a class action is superior to other methods for  
 6 the fast and efficient adjudication of this controversy, for at least the following  
 7 reasons:

- 8 a. Absent a class action, members of the Class as a practical matter will  
 9 be unable to obtain redress, Defendant's violations of their legal  
 10 obligations will continue without remedy, additional consumers will be  
 11 harmed, and Defendant will continue to retain its ill-gotten gains;
- 12 b. It would be a substantial hardship for most individual members of the  
 13 Class if they were forced to prosecute individual actions;
- 14 c. When the liability of Defendant has been adjudicated, the Court will be  
 15 able to determine the claims of all members of the Class;
- 16 d. A class action will permit an orderly and expeditious administration of  
 17 each Class member's claims and foster economies of time, effort, and  
 18 expense;
- 19 e. A class action regarding the issues in this case does not create any  
 20 problems of manageability; and
- 21 f. Defendant has acted on grounds generally applicable to the members of  
 22 the Class, making class-wide monetary relief appropriate.

23 82. Plaintiff does not contemplate class notice if the Class is certified under  
 24 Rule 23(b)(2), which does not require notice, and notice to the putative Class may  
 25 be accomplished through publication, signs or placards at the point-of-sale, or other  
 26 forms of distribution, if necessary, if the Class is certified under Rule 23(b)(3) or if  
 27 the Court otherwise determines class notice is required. Plaintiff will, if notice is so  
 28



1 required, confer with Defendant and seek to present the Court with a stipulation and  
2 proposed order on the details of a class notice program.

### 3 **COUNT I**

#### 4 **Injunctive Relief for Violations of the Consumers Legal Remedies Act**

5 **(Cal. Civil Code §§ 1750 *et seq.*)**

6 **(On Behalf of Plaintiff and the Class and Against Defendant)**

7 83. Plaintiff repeats and realleges the allegations contained in the  
8 paragraphs above, as if fully set forth herein.

9 84. This cause of action is brought pursuant to the Consumers Legal  
10 Remedies Act, California Civil Code §§ 1750, *et seq.* (“CLRA” or the “Act”), which  
11 provides that enumerated listed “unfair methods of competition and unfair or  
12 deceptive acts or practices [including those listed below in ¶ 91] undertaken by any  
13 person in a transaction intended to result or which results in the sale or lease of  
14 goods or services to any consumer are unlawful,” CLRA § 1770, and that “[a]ny  
15 consumer who suffers any damage as a result of the use or employment by any  
16 person of a method, act, or practice declared to be unlawful by Section 1770 may  
17 bring an action against such person to recover or obtain,” various forms of relief,  
18 including injunction and damages. Cal. Civ. Code § 1780. This cause of action is  
19 limited solely to injunctive relief on behalf of the Class at this time.

20 85. On January 16, 2014, prior to the filing of this Complaint, Plaintiff sent  
21 Defendant a CLRA notice letter providing the notice required by California Civil  
22 Code § 1782(a). Plaintiff sent the letter via certified mail, return receipt requested,  
23 to the location in Los Angeles where Plaintiff purchased NJOY E-Cigarettes, as well  
24 as to Defendant’s principal place of business in Arizona, and to the Secretary of  
25 State of Nevada, advising Defendant that it is in violation of the CLRA and must  
26 correct, replace or otherwise rectify the goods and/or services alleged to be in  
27 violation of § 1770. Defendant was further advised that in the event the relief  
28

1 requested has not been provided within thirty (30) days, Plaintiff will amend his  
2 Complaint to include a request for monetary damages pursuant to the CLRA. A true  
3 and correct copy of Plaintiff's letter is attached hereto as Exhibit A.

4 86. Plaintiff was deceived by Defendant's unlawful practices as described  
5 more fully above, which included carrying out an advertising campaign, directed at  
6 Plaintiff and the Class, conveying the message that NJOY E-Cigarettes provide  
7 "everything you like about smoking without the things you don't,"<sup>33</sup> and variations  
8 of that statement, which were deceptive, false and misleading given the ingredients  
9 and characteristics of NJOY products which are known or should be known to  
10 Defendant, and the studies that have found carcinogens, toxins, and other potentially  
11 harmful impurities in NJOY E-Cigarettes and electronic cigarettes generally,  
12 including certain of those found in traditional tobacco cigarettes, and that NJOY E-  
13 Cigarettes require that the user take significantly stronger puffs than the puffs  
14 required for a traditional cigarette, and that this could be harmful to health which  
15 was not disclosed. Also undisclosed was the lack of research required to assess the  
16 potential danger of electronic cigarettes, especially in long term users.

17 87. Defendant's actions, representations and conduct have violated, and  
18 continue to violate the CLRA, because they extend to transactions that are intended  
19 to result, or which have resulted, in the sale of goods to consumers.

20 88. Defendant marketed, sold and distributed NJOY E-Cigarettes in  
21 California and throughout the United States during the relevant period.

22 89. Plaintiff and members of the Class are "consumers" as that term is  
23 defined by the CLRA in Cal. Civ. Code § 1761(d).

24 90. Defendant's NJOY E-Cigarettes were and are "good[s]" within the  
25 meaning of Cal. Civ. Code §§ 1761(a) & (b).

26 <sup>33</sup> NJOY, <http://www.njoy.com/njoy-kings/njoy-king-3-pack.html> (last visited  
27 Jan. 7, 2014).

1           91. Defendant violated the CLRA by engaging in the at least following  
 2 practices proscribed by California Civil Code § 1770(a) in transactions with Plaintiff  
 3 and the Class which were intended to result in, and did result in, the sale of NJOY  
 4 E-Cigarettes:

5                   (5) Representing that [NJOY E-Cigarettes have] . . . approval,  
 6 characteristics . . . uses [or] benefits . . . which [they do] not have . . . .

7   \*\*\*

8                   (7) Representing that [NJOY E-Cigarettes are] of a particular standard,  
 9 quality or grade . . . if [they are] of another.

10   \*\*\*

11                   (9) Advertising goods . . . with intent not to sell them as advertised.

12           92. As such, Defendant's conduct constitutes unfair methods of  
 13 competition and unfair or fraudulent acts or practices because it does not sell, and  
 14 because it intends not to sell, the NJOY E-Cigarettes as advertised and instead  
 15 misrepresents the particulars by, in its marketing, representing NJOY E-Cigarettes  
 16 as described above when it knew, or should have known, that the representations  
 17 and advertisements were deceptive, false and misleading in light of the omissions of  
 18 material facts as described above.

19           93. The omitted information would have been material to a reasonable  
 20 customer in his or her decision as to whether to purchase the NJOY E-Cigarettes  
 21 and/or purchase the NJOY E-Cigarettes at the price at which they were offered.

22           94. Defendant had a duty to disclose this information to Plaintiff and the  
 23 members of the Class for several reasons. First, Defendant repeatedly made the  
 24 representation that its products offer "everything you like about cigarettes and  
 25 nothing you don't," or closely analogous representations, as detailed above.  
 26 Disclosure of the omitted information, including information in the studies referred  
 27 to *supra* in Section II, was necessary to avoid the false impression of safety  
 28

1 provided by that tagline. Second, Defendant was in a position to know, both from  
2 its own product knowledge and creation decisions and the studies of the presence of  
3 carcinogens, toxins, and other impurities in its NJOY E-Cigarettes, especially as  
4 described in the FDA's 2009 study of NJOY and Smoking Everywhere Products  
5 referenced *supra* at ¶¶ 23-26, while consumers were not reasonably in a position to  
6 be aware of Defendant's internal product information or such studies. Third,  
7 Defendant actively omitted to disclose, or actively concealed, these material facts as  
8 to Plaintiff and the Class. Finally, while Defendant made representations about the  
9 risks associated with its NJOY E-Cigarettes, stating that they contain nicotine and  
10 bear risks related thereto, those representations were misleading half-truths because  
11 they implied that those are all of the risks relating to the product, when, in fact, they  
12 are not.

13 95. Defendant provided Plaintiff and the other Class members with  
14 e-cigarettes that did not match the quality portrayed by their marketing.

15 96. As a result, Plaintiff and members of the Class have suffered  
16 irreparable harm. Plaintiff's and the other Class members' injuries were  
17 proximately caused by Defendant's conduct as alleged herein. Plaintiff,  
18 individually and on behalf of all other Class members, seeks entry of an order  
19 enjoining Defendant from continuing to employ the unlawful methods, acts and  
20 practices alleged herein pursuant to California Civil Code section 1780(a)(2),  
21 ordering the payment of costs and attorneys' fees, and such other relief as deemed  
22 appropriate and proper by the Court under California Civil Code section 1780(a)(2).  
23 If Defendant is not restrained from engaging in these practices in the future, Plaintiff  
24 and the Class will continue to suffer harm.

25 97. Pursuant to section 1780(d) of the CLRA, attached hereto as Exhibit B  
26 is an affidavit showing that this action has been commenced in the proper forum.

**COUNT II**

**Injunctive and Equitable Relief for Violations of Unfair Competition Law**

**(Business & Professions Code §§ 17200, *et seq.*)**

**(On Behalf of Plaintiff and the Class and Against Defendant)**

98. Plaintiff repeats and realleges the allegations contained in the paragraphs above, as if fully set forth herein.

99. The Unfair Competition Law, Cal. Business & Professions Code § 17200, *et seq.* (“UCL”), prohibits any “unlawful,” “unfair,” or fraudulent, business act or practice and any false or misleading advertising.

100. In the course of conducting business, Defendant committed unlawful business practices by, *inter alia*, making the representations (which also constitute advertising within the meaning of § 17200) and omissions of material facts, as set forth more fully herein, and violating Cal. Civil Code §§ 1750, *et seq.*, and the common law.

101. Plaintiff, individually and on behalf of other Class members, reserves the right to allege other violations of law which constitute other unlawful business acts or practices. Such conduct is ongoing and continues to this date.

102. Defendant’s actions constitute “unfair” business acts or practices because, as alleged above, *inter alia*, Defendant engages in deceptive and false advertising, and misrepresents and omits material facts regarding its electronic cigarettes and related paraphernalia, and thereby offends an established public policy, and engages in immoral, unethical, oppressive, and unscrupulous activities that are substantially injurious to consumers. This conduct constitutes violations of the unfair prong of Business & Professions Code §§ 17200, *et seq.*

103. Business & Professions Code §§ 17200, *et seq.*, also prohibits any “fraudulent business act or practice.”

///

1           104. Defendant's actions, claims, nondisclosures, and misleading  
2 statements, as alleged in this Complaint, also constitute "fraudulent" business  
3 practices in violation of the UCL because, among other things, they are false,  
4 misleading, and/or likely to deceive reasonable consumers within the meaning of  
5 Business & Professions Code §§ 17200, *et seq.*

6           105. There were reasonably available alternatives to further Defendant's  
7 legitimate business interests, other than the conduct described herein.

8           106. As a result of Defendants' pervasive false marketing, including  
9 deceptive and misleading acts and omissions as detailed in this Complaint, Plaintiff  
10 and other members of the Class have in fact been harmed as described above. If  
11 Defendant had disclosed the information discussed above about the NJOY E-  
12 Cigarettes and otherwise been truthful about their safety, Plaintiff would not have  
13 purchased Defendant's products. Defendant was also able to charge more than what  
14 its NJOY E-Cigarettes would have been worth had it disclosed the truth about them.

15           107. As a result of Defendant's unlawful, unfair, and fraudulent practices,  
16 Plaintiff and the other Class members have suffered injury in fact and lost money.

17           108. As a result of its deception, Defendant has been able to reap unjust  
18 revenue and profit in violation of the UCL.

19           109. Unless restrained and enjoined, Defendant will continue to engage in  
20 the above-described conduct. Accordingly, injunctive relief is appropriate for  
21 Plaintiff and the Class.

22           110. As a result of Defendant's conduct in violation of the UCL, Plaintiff  
23 and members of the Class have been injured as alleged herein in amounts to be  
24 proven at trial because they purchased NJOY E-Cigarettes without full disclosure of  
25 the material facts discussed above.

26           111. As a result, Plaintiff individually, and on behalf of the Class, and the  
27 general public, seeks restitution and disgorgement of all money obtained from  
28

1 Plaintiff and the members of the Class collected by Defendant as a result of  
2 unlawful, unfair, and/or fraudulent conduct, and seeks injunctive relief, and all other  
3 relief this Court deems appropriate, consistent with Business & Professions Code §  
4 17203.

5 **COUNT III**

6 **Damages for Breach of Express Warranty**

7 **(On Behalf of Plaintiff and the Class and Against Defendant)**

8 112. Plaintiff repeats and realleges the allegations contained in the  
9 paragraphs above, as if fully set forth herein.

10 113. Plaintiff brings this claim individually and on behalf of the Class.

11 114. Plaintiff, and each member of the Class, formed a contract with  
12 Defendant at the time Plaintiff and the other members of the Class purchased NJOY  
13 E-Cigarettes or related paraphernalia. The terms of that contract include the  
14 promises and affirmations of fact made by Defendant on its NJOY E-Cigarettes  
15 packaging and inserts and through the NJOY marketing campaign, as described  
16 above. This product packaging and advertising constitutes express warranties,  
17 became part of the basis of the bargain, and is part of a standardized contract between  
18 Plaintiff and the members of the Class on the one hand, and Defendant on the other.

19 115. Plaintiff and the Class members performed their obligations under the  
20 contract.

21 116. Defendant breached the terms of this contract, including the express  
22 warranties, with Plaintiff and the Class by not providing NJOY E-Cigarettes that  
23 offered “everything you like about smoking without the things you don’t,” (or similar  
24 variations) and otherwise omitted material information about potential health risks  
25 associated with the product. Such express warranties breached by Defendant include  
26 the NJOY E-Cigarette representations set forth above in Section III.

27 ///



117. As a result of Defendant's breach of its contract, Plaintiff and the Class have been damaged in the amount of the purchase price of the NJOY E-Cigarettes and related paraphernalia they purchased.

**PRAYER FOR RELIEF**

Wherefore, Plaintiff prays for a judgment:

- a. Certifying the Class as requested herein, appointing Plaintiff as the class representative for the Class and his undersigned counsel as class counsel;
- b. Requiring Defendant to disgorge or return all monies, revenues and profits obtained by means of any wrongful act or practice to Plaintiff and the members of the Class under each cause of action where such relief is permitted;
- c. Enjoining Defendant from continuing the unlawful practices as set forth herein, including marketing or selling NJOY E-Cigarettes without disclosing the potential health risks relating thereto, and directing Defendant to engage in corrective action, or providing other injunctive or equitable relief;
- d. Awarding damages for breach of express warranty;
- e. Awarding all equitable remedies available pursuant to Cal. Civ. Code § 1780 and other applicable law;
- f. Awarding attorneys' fees and costs;
- g. Awarding pre-judgment and post-judgment interest at the legal rate; and
- h. Providing such further relief as may be just and proper.

DATED: January 17, 2014

**WOLF HALDENSTEIN ADLER  
FREEMAN & HERZ LLP**

By:



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Attorneys for Plaintiff Ben Z. Halberstam

**DEMAND FOR JURY TRIAL**

Plaintiff hereby demands a trial by jury on all issues so triable.

DATED: January 17, 2014

**WOLF HALDENSTEIN ADLER  
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NJOY:20460v7.complaint

# **EXHIBIT A**

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312-984-0000

RACHELE R. RICKERT  
rickert@whafh.com

January 16, 2014

VIA CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

NJOY, Inc.  
15211 North Kierland Boulevard  
Suite 200  
Scottsdale, AZ 85254

Sottera, Inc.  
Secretary of State  
202 N. Carson St.  
Carson City, NV 89701

NJOY, Inc.  
Sottera, Inc.  
c/o Walgreens  
8770 W Pico Blvd.  
Los Angeles, CA 90035

Sottera, Inc.  
c/o NJOY, Inc.  
15211 North Kierland Boulevard  
Suite 200  
Scottsdale, AZ 85254

Re: *Halberstam v. NJOY, Inc., et al.*  
Notice of Violation of the California Consumers Legal Remedies Act and Breach  
of Express Warranty

Dear Sir or Madam:

We send this letter on behalf of our client, Ben Z. Halberstam, currently a resident of California, as well as on behalf of a proposed class of all persons who purchased in or from California one or more electronic cigarettes, or components thereof, or cartridges therefore (the "NJOY E-Cigarettes") manufactured, sold or distributed by NJOY, Inc. and/or Sottera, Inc. (collectively "Defendants") to advise you that Defendants have violated and continue to violate the Consumers Legal Remedies Act ("CLRA"), California Civil Code section 1750, *et seq.* We hereby ask that Defendants remedy such violations within thirty (30) days.

Defendants are engaging in unfair competition and unfair or deceptive acts or practices with regard to the manner in which Defendants advertise and market to California consumers the electronic cigarettes and related paraphernalia that they manufacture. Specifically, NJOY makes, and during the relevant period, Sottera has made, representations about the safety of their products, including but not limited to that NJOY E-Cigarettes contain "everything you like about smoking without the things you don't," and similar variations on that theme, which is deceptive, false and misleading in light of numerous studies that show that electronic cigarettes, including

January 16, 2014  
Page 2

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP

NJOY E-Cigarettes, contain carcinogens, toxins and other impurities, some of which are those found in tobacco cigarettes, that, like tobacco cigarettes, can cause disease, which is not disclosed. Also undisclosed is the fact that there is widespread agreement in the scientific community that further research is necessary before the full adverse effects of electronic cigarette use on users' health can be known.

These activities violate California Civil Code section 1770(a), in particular by:

- Representing that [the] goods have ... approval, characteristics, . . . uses [or] benefits which they do not have;
- Representing that [the] goods ... are of a particular standard, quality or grade ... if they are of another; and
- Advertising goods ... with intent not to sell them as advertised.

Our client will shortly file a complaint for, *inter alia*, injunctive relief under the CLRA, and will amend such complaint to seek monetary relief under the CLRA unless, within thirty (30) days, Defendants correct, repair, or otherwise rectify the violations specified above

If Defendants fail to comply with this request within thirty (30) days, Defendants may be liable for the following monetary amounts under the CLRA:

- Actual damages suffered;
- Punitive damages;
- Costs and attorney's fees related to suit; and
- Penalties of up to \$5,000.00 for each incident where senior citizens have suffered substantial physical, emotional or economic damage resulting from Defendants' conduct.

As will be set forth in the Class Action Complaint, Defendants' practices also violate the California Business & Professions Code § 17200 *et seq.*, and constitute breach of express warranty.

With respect to the claim for breach of express warranty, this letter constitutes statutory notice pursuant to California Uniform Commercial Code § 2-607(3)(A) (as well as under applicable laws of all other states) of Defendants' breach of express warranty. Defendants breached their warranties with class members by providing them with NJOY E-Cigarettes that were not of the quality that Defendants represented.

We hereby demand on behalf of Mr. Halberstam and all others similarly situated that Defendants immediately correct and rectify their violations by ceasing the deceptive and misleading marketing and advertising described above of NJOY products, including that NJOY E-Cigarettes provide "everything you like about smoking without the things you don't," and variations of that statement, and making other claims about the health benefits of using NJOY, as described above. We further demand that Defendants initiate a corrective marketing and advertising campaign. In addition, Defendants must offer to refund consumers for their purchases of NJOY E-Cigarettes and provide reimbursement for interest.

It is our hope that Defendants will choose to correct these unlawful practices promptly. A failure to act within thirty (30) days will be considered a denial of this claim and our client



January 16, 2014  
Page 3

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will act accordingly. If you would like to discuss the matter, please do not hesitate to call us at 619-239-4599. Otherwise, we look forward to Defendants immediately changing their practices and compensating Mr. Halberstam and the other members of the proposed class identified above.

Sincerely,

  
Rachele R. Rickert

## **EXHIBIT B**

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17  
18 Attorneys for Plaintiff Ben Z. Halberstam

19 **UNITED STATES DISTRICT COURT**  
20 **SOUTHERN DISTRICT OF CALIFORNIA**

21 BEN Z. HALBERSTAM, California  
22 Resident, on Behalf of Himself and All  
23 Others Similarly Situated,

24 Plaintiff,

25 -against-

26 NJOY, INC. and SOTTERA, INC.  
27

28 Defendants.

Case No. CV

**AFFIDAVIT OF PLAINTIFF BEN  
Z. HALBERSTAM PURSUANT  
TO CAL. CIV. CODE § 1780(d)**

1 I, BEN Z. HALBERSTAM, hereby declare that:

2 1. I have personal knowledge of the facts stated herein and could  
3 competently testify thereto if called upon to do so.

4 2. I am currently a resident of Los Angeles County and a Plaintiff in the  
5 above-entitled action.

6 3. My Complaint filed in this matter contains causes of action for  
7 violations of California's Consumers Legal Remedies Act and Unfair Competition  
8 Law, as well breach of express warranty, against NJOY, Inc., a company doing  
9 business nationwide, including in Los Angeles County, and Sottera, Inc., a company  
10 formerly doing business nationwide, including in Los Angeles County, which has  
11 merged into NJOY, Inc. (collectively "Defendants"). These causes of action arise  
12 out of Defendants' marketing, selling and distributing of their electronic cigarettes  
13 and related paraphernalia through the use of false, deceptive and misleading  
14 statements, including, but not limited to, that NJOY Electronic Cigarettes contain  
15 "everything you like about smoking without the things you don't," and similar  
16 variations on that theme, without disclosing to California consumers that numerous  
17 studies have indicated that electronic cigarettes contain carcinogens, toxins and  
18 other impurities that, like tobacco cigarettes, can cause disease, and that there is  
19 widespread agreement in the scientific community that further research is necessary  
20 before the full effects of electronic cigarette use on users' health can be known.

21 I declare under penalty of perjury under the laws of the State of California  
22 that the foregoing Declaration is true and correct, and was executed by me in the  
23 City of Los Angeles, Los Angeles, California on December \_\_, 2013.

24  
25   
26 BEN Z. HALBERSTAM

27 SEE ATTACHED NOTARY  
28

## ACKNOWLEDGMENT

State of California

County of LOS ANGELES

On 12-20-2013 before me, JEFF B PAK A NOTARY PUBLIC  
(insert name and title of the officer)

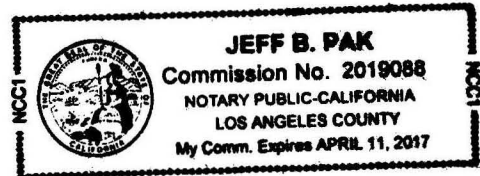
personally appeared BEN Z. HALBERSTAM,  
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are  
subscribed to the within instrument and acknowledged to me that he/she/they executed the same in  
his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the  
person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing  
paragraph is true and correct.

WITNESS my hand and official seal.

Signature [Signature]

(Seal)



✓ US DISTRICT COURT SOUTHERN DISTRICT OF  
CALIFORNIA